THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CRIMINAL APPEAL NO. 0178 OF 2021

BENJAMIN OTEKA::APPELLANT

VERSUS

UGANDA::RESPONDENT

(Appeal from the decision of the High Court of Uganda at Kampala (Anti-Corruption Division) before Gidudu, J. delivered on 10th May, 2021 in Criminal Appeal No. 022 of 2020)

CORAM: HON. LADY JUSTICE ELIZABETH MUSOKE, JA
HON. LADY JUSTICE CATHERINE BAMUGEMEREIRE, JA
HON. MR. JUSTICE STEPHEN MUSOTA, JA

JUDGMENT OF THE COURT

This is a second appeal from the decision of the High Court (Gidudu, J.) substantially dismissing an appeal filed by the appellant and upholding the decision of the trial Magistrate Grade I to convict the appellant on one count of embezzlement, two counts of theft and one count of Stealing a Vehicle.

Background

The appellant was charged in the trial Magistrate's Court (HW Nabende) with 5 counts, as follows: 1 count of Embezzlement contrary to **Section 19 (d) (i)** of the **Anti-Corruption Act, 2009** (count 1); 2 counts of **Theft** contrary to **Sections 254 (1)** and **261** of the **Penal Code Act, Cap. 120** (counts 2 and 3), 1 count of **Stealing a Vehicle** contrary to **Section 265** of the **Penal Code Act, Cap. 120** (Count 4); and 1 count of **Conspiracy to Commit a Felony** Contrary to **Section 290** of the **Penal Code Act, Cap. 120** (count 5). The learned trial Magistrate sentenced the appellant to 7 years imprisonment on count 1; and 3 years imprisonment on each of counts 2, 3, 4 and 5. The sentences on each count were ordered to run concurrently. The learned trial Magistrate also made an order for the appellant to pay compensation monies, to the tune of Australian Dollars 100,400, Kenyan Shillings 700,000/= and Ug. Shs. 30,000,000/=. The appellant was dissatisfied and appealed to the High Court. The learned High Court Judge

on appeal, upheld the conviction of the appellant on counts 1, 2, 3 and 4, but quashed the conviction on count 5. He also upheld the compensation orders.

The facts of the case, as per the findings of the trial Magistrate, can be summarized briefly. In 2008, the appellant married an American national called Ms. Carol Ann Ward. The couple were both subsequently involved in the running of an entity known as Faith of God Ministries (FOG) based in Gulu District. FOG was involved in evangelism and also ran other related community projects including community development, trauma counselling and literacy promotion. At the beginning, Ms. Ward was the Director of FOG and the appellant was an employee. Ms. Ward and the appellant conducted fundraising activities for FOG, and one of the funders they successfully contacted was Mr. Raymond Hannah, an Australian. From 2010 to 2013, Mr. Hannah sent money for FOG, to the tune of Australian Dollars 104,000. This money was received either by the appellant directly or through Mr. Denish Oketayot under the instructions of the appellant. The money was not forwarded to FOG but was instead diverted for the personal use of the appellant. The appellant was deemed to have stolen the money, received from Mr. Hannah, from FOG and that he had access to that money by virtue of his employment with FOG hence his being charged and convicted for embezzlement. The appellant was also found to have conspired with Mr. Oketayot to commit the felony of embezzlement in connection with theft of money from FOG.

Furthermore, between 2013 and 2014, FOG acquired property including musical equipment like speakers, amplifiers, microphones, among others; and some household property like a bed, mattress, cloth rack, gas cooker,; and a tractor donated to it by Mount Olive Maara Ministries, Kenya. The appellant stole the highlighted property from FOG. The theft of this property was the subject of the two counts of theft of which the appellant was convicted. The learned trial Magistrate convicted the appellant on the basis of the above facts.

On appeal, the learned first appellate Judge largely agreed with the findings of the learned trial Magistrate, save for the conviction on the count of Conspiracy to Commit a Felony which he quashed. He also varied the sentence on count 1 to 5 years while he upheld the sentences imposed on

counts 2, 3 and 4. The appellant, being dissatisfied with the learned first appellate Judge, now appeals to this Court on the following grounds:

"1. **That the learned Judge acting in his appellate capacity erred in law when he upheld the appellant's convictions for embezzlement on count 1 and theft on counts 2, 3 and 4 in the absence of cogent ingredients and evidence to prove the alleged offences hence caused gross injustice.**

2. **That the learned Justice of the first appellate Court erred in law when he wrongly and subjectively supported the findings of the trial Court that the appellant did not raise any reasonable doubt in the prosecution alleged offence, whereas no obligations lay upon him.**

3. **That the learned Justice of the first appellate Court erred in law when he improperly evaluated the whole evidence and or isolated the prosecution case from the appellant's defence regarding the alleged offences of embezzlement.**

4. **That the learned justice of the first appellate court erred in law when he substituted an illegal sentence with yet illegal and unconstitutional term of imprisonment which does not reckon the appellant's remand period.**

5. **That the sentence and order for compensation of Australian dollars 100,400, Kenyan currency 700,000 and Ug. Shs. 30,000,000/= upheld by the first appellate Court be deemed unreasonable excessive and harsh in the circumstances of the case where the alleged stolen property were recovered and restored to the victims."**

The respondent opposed the appeal.

Representation

At the hearing of the appeal, Mr. Ariho Katebire Dathan, learned counsel represented the appellant. Ms. Gloria Inzikuru, learned Chief State Attorney and Ms. Gertrude Apio, learned State Attorney, both from the Office of the Director Public Prosecutions, jointly represented the respondent. The appellant followed the hearing via Zoom Video Conferencing Technology.

The parties filed written submissions, in accordance with directives given by the Court.

Appellant's submissions

Counsel for the appellant argued each ground independently.

Ground 1

Counsel submitted that the learned first appellate Judge erred when he found that the appellant was an employee of Favour of God Ministries (FOG), the organization from which he allegedly embezzled money. Counsel contended that this error was especially crucial because it is a key ingredient of the offence of embezzlement that the accused must have been an employee of the organization in issue. Counsel relied on the authority of **Balikoowa vs. Uganda, Court of Appeal Criminal Appeal No. 221 of 2014 (unreported)** in support of his submissions. Counsel submitted that the evidence in this case indicated that between 2011 and 2013, when the appellant is alleged to have stolen money from FOG, he had stopped being its employee having been earlier suspended from employment in 2010, and finally dismissed in 2012. He also submitted that the learned first appellate Judge wrongly found that the appellant continued executing duties as a FOG employee yet there was no evidence to support this finding. Counsel urged this Court to reverse the learned first appellate Judge's findings and find that the appellant was not a FOG employee at the material time.

It was further the submission of counsel that the learned first appellate Judge poorly evaluated the evidence and as a result made an erroneous finding that the appellant stole money to the tune of USD 104,000 from FOG. He made reference to Section **254 (1)** of the **Penal Code Act, Cap. 120** and the authority of **Uganda vs. Opoi, High Court Criminal Session Case No. 112 of 2014 (unreported)**, and pointed out that the offence of theft happens when a person, fraudulently and without any claim of right takes the property of another. He submitted that the appellant ought not to have been convicted for stealing money from FOG, because as per the appellant's evidence, whereas he admitted to having received money from PW16 Ray Hannah, that money was rightly put to its intended use, on expenditure related to organizing crusade activities both nationally and in foreign places like Juba in South Sudan. The appellant also testified that the

said crusades had taken place and both PW7 Carol Ward the Director FOG and PW16 Hannah attended the crusades.

As for the evidence of theft of equipment from FOG's store covered in count 2, counsel submitted that the evidence of DW4, the area LC1 Chairperson was that no theft took place at all. Counsel further submitted that the prosecution evidence was affected by several grave inconsistencies and contradictions and should not have been believed. Counsel contended that it was suspicious that police statements of some of the witnesses were recorded in 2016, 3 years after the alleged theft in 2013. In addition, whereas PW6 Akello Betty stated that she saw the appellant stealing property from FOG, she later stated that she was not at the scene of the crime. Counsel also submitted that according to a voucher (PEXH7) tendered in evidence by PW7, the property allegedly stolen from FOG's store, was in the names of Faith Centre Cathedral and not FOG, which suggested that the property did not belong to FOG.

Counsel further submitted that it was erroneous for the learned first appellate Judge to uphold the appellant's conviction on count 3 for the theft of household property from FOG which was a place of work. Moreover, to counsel, the prosecution did not prove that FOG intended to permanently deprive the appellant of the said household property. Further still, the evidence of DW3 was that the appellant had opened the office where the property was kept in the presence of Harriet Lamunu, a FOG employee, and he only took personal belongings and a mattress. Counsel also contended that the learned first appellate Judge did not re-evaluate the evidence concerning the incidents of theft covered under counts 2 and 3.

It was further submitted by counsel that the learned first appellate Judge based on inadmissible evidence to uphold the appellant's conviction for Stealing a Vehicle (Count 4). The learned trial Magistrate had convicted the appellant after erroneously believing prosecution evidence that the appellant had stolen a tractor donated to FOG by Mount Olive Maara Ltd of Kenya. Counsel submitted that the appellant had stated in his evidence that he had bought the tractor from Mount Olive Maara Ltd and adduced in evidence a sale agreement. However, the trial Court had disbelieved that evidence in favour of the oral evidence of PW7 Carol Vezey that the tractor had been given to FOG backed by irrelevant emails (Ex P.3). Counsel submitted that

in relying on the prosecution evidence yet there was a sale agreement meant that the lower Courts acted in disregard of the parole evidence rule to the effect that extraneous evidence is inadmissible to add, vary or contradict the contents of a written agreement.

Ground 2

Counsel submitted that the learned first appellate Judge, in upholding the appellant's convictions on counts 1, 2, 3 and 4, acted contrary to well established legal principles, including the principle that the burden lies on the prosecution to prove a criminal charge against an accused beyond reasonable doubt as enshrined under **Article 23 (8)** of the **1995 Constitution**; and as articulated in **Woolmington vs. DPP [1935] AC 462**; the principle that an accused person should be convicted on the strength of the prosecution case and not the weakness of the defence (**Epuku s/o Achietu vs. R (1934) 1 EACA 166**; and the principles on standard of proof articulated in **Miller vs. Minister of Pensions (1947) ALLER 372.** Counsel submitted that as demonstrated in the submissions on ground 1, the appellant presented sufficient evidence to destroy the prosecution case on embezzlement in that he proved that he was not an employee of FOG. He further submitted that the appellant should not have been convicted of embezzlement because he proved that he had utilized the money he received from PW16 Hannah on activities like crusades which it was intended for.

Ground 3

It was submitted that the learned first appellate Judge adopted a wrong approach while evaluating evidence in that he considered only the prosecution evidence and overlooked the defence evidence. Counsel submitted that in **Bogere Moses vs. Uganda, Supreme Court Criminal Appeal No. 1 of 1997 (unreported),** the Court stated that it is fundamentally wrong to evaluate the case for the prosecution in isolation and consider whether or not the case for the defence rebuts or casts doubt on it. Indeed, no single piece of evidence should be weighed except in relation to all of the rest of the evidence. Counsel singled out the learned first appellate Judge's evaluation of evidence on theft of the tractor (count

4) as an instance where he only considered the prosecution evidence in isolation with the defence evidence.

Counsel also contended that as for the evidence in support of count 2 and 3, the learned first appellate Judge did not reevaluate that evidence at all.

Ground 4

Counsel submitted that the learned first appellate Judge imposed illegal sentences on the appellant without taking into account the appellant's remand period, contrary to the requirement to do so under **Article 23 (8)** of the **1995 Constitution**. Counsel further submitted that it was held, in **Rwabugande vs. Uganda, Supreme Court Criminal Appeal No. 25 of 2014 (unreported)**, that a sentence arrived at without taking into consideration of the period that the accused person spent on remand is illegal for failure to comply with a mandatory constitutional provision. Counsel submitted that the appellant in the present case spent 19 days on remand from 23rd December, 2015 to 11th January, 2016, yet the learned first appellate Judge did not deduct the remand period from the sentences he imposed as per the guidance given in the **Rwabugande case (supra)**. Counsel submitted that, for those reasons, the sentences imposed on the appellant ought to be set aside for being illegal.

Ground 5

Counsel submitted that the learned first appellate Judge erred when he upheld the orders made by the learned trial Magistrate for the appellant to pay compensation money of Australian Dollars 100,400; Kenya Shillings 700,000; and Uganda Shillings 30,000,000/=, being the value of money and property that the appellant stole from FOG was unreasonable and excessive. The sum of Kenya Shillings 700,000 was awarded as the price of the tractor the appellant stole from FOG, but to counsel, that amount was unreasonable since the tractor in issue was recovered and kept at a police station. Counsel further contended that the award of Australian Dollars 100,400 should not have been made considering that the appellant gave sufficient evidence that he used that money as intended. Further still, the award of a Uganda Shillings 30,000,000/=, being the value of music equipment and house hold items allegedly stolen from FOG, the subject of counts 2 and 3, was also erroneous because there was no evidence as to the actual value of the

property that was stolen. Moreover, the said property was never valued so as to ascertain its actual value.

In view of the above submissions, counsel prayed this Court to allow the appeal, quash the appellant's convictions on counts 1, 2, 3 and 4, and set aside the relevant sentences. In the alternative, counsel prayed that, if this Court upholds the convictions, it deems it fit to impose more lenient sentences and sets aside the compensation orders.

Respondent's submissions

In reply, counsel for the respondent argued grounds 1, 2 and 3 jointly, and each of grounds 4 and 5 independently.

Grounds 1, 2 and 3

On the submission that the appellant was not an employee of FOG at the material times covered in the embezzlement charge, counsel submitted that the prosecution evidence was sufficient to support a finding that the appellant was, at all material times, an employee of FOG. PW6 Okello Betty tendered in evidence an appointment letter dated 21st July 2008, and a termination letter dated 1st May, 2012 which indicated that whereas the appellant was terminated from employment, he continued receiving salary from FOG. Counsel submitted that the learned first appellate Judge was right when he found that the appellant was an employee of FOG despite his original contract having been terminated.

Regarding the submission that the appellant did not steal money to the tune of Australia Dollars 104,000 but that he had used it as intended on local and foreign crusades, counsel submitted that the evidence indicated that the crusades the appellant claimed to have spent money on were organized by another organization called Life Encounter Ministries (LEM) and not FOG, and that former had no connection to FOG. Counsel submitted that the prosecution evidence was that proper handling of funds meant for FOG crusades was done by FOG's accounts department and not the appellant. further, that whereas the appellant was supposed to disclose the money received, from donors, on FOG's account he never did so with the money in question. Counsel concluded that the evidence indicated that the appellant fraudulently stole money from FOG.

Furthermore, counsel disagreed with the appellant's contention that the learned first appellant judge wrongly overlooked the evidence of DW3 and DW4 while evaluating the evidence relating to counts 2, 3 and 4. Counsel submitted that the evidence of DW3 was not cogent. The witness alleged that he was a bailiff and that it was his bailiff firm that had taken FOG's music and household property and not the appellant, but he failed to produce a demand notice authorizing the seizing of the property and could not remember the date on which he seized the goods. DW4 did not know the disputed property yet he defended the appellant.

Further, counsel submitted that the musical property the appellant took from the FOG premises was purchased by the appellant, but using FOG's funds, yet the appellant obtained a receipt (PEXH9) to fraudulently claim that he used his money to buy that property for another organization Faith Centre Cathedral. To counsel, this was a strategy by the appellant to steal from FOG. Counsel further submitted that the PW8's evidence also indicated that even the tractor in issue was purchased for use by FOG.

Counsel further submitted, in respect to the household property covered by ground 3, that the prosecution proved beyond reasonable doubt that that property belonged to FOG and thus the appellant could not sustain a defence of claim of right in relation to that property.

With regard to theft of the tractor covered in count 4, counsel submitted that the learned trial Judge properly handled the evidence, especially the prosecution evidence that showed that the appellant stole the tractor from FOG. She submitted that the learned first appellate Judge was right when he found that the appellant had schemed to steal the tractor from PW7 who had entrusted him to handle the complex tax procedures involved in moving the tractor from Kenya to Uganda. Counsel submitted that the parole evidence rule invoked by the appellant should not be applied in this case given the fraudulent behaviour of the appellant.

Counsel also addressed the alleged grave contradictions in the prosecution case, highlighted by the appellant. On the issue surrounding the delay of about 3 years in recording the witness statement of PW6, counsel submitted that PW6's statement was not tendered in evidence so as to verify counsel's statements. In addition, the statement was not mentioned by either the

prosecution or the appellant's counsel at trial, which in to counsel, suggested that the date for the statement as alluded to in the judgments of the lower Courts may have been erroneously recorded. As for the alleged contradiction as to whether PW6 was present at the scene of crime, counsel submitted that any such discrepancy did not go to the root of the prosecution case as there were other witnesses who saw the appellant at the scene of crime.

Counsel concluded that, overall, there is no merit in the appellant's contention that the learned first appellate Judge failed to properly re-evaluate the evidence on record, and that mere failure by the first appellate Judge to mention every minute detail of the evidence was not a sufficient ground for finding that he did not consider any of the evidence. Counsel submitted it was held in **Cheptuke vs. Uganda, Supreme Court Criminal Appeal No. 01 of 2013 (unreported)** that there is no prescribed format for an appellate court's judgment, and failure to give detailed evaluation of all the evidence is not a ground to challenge the findings contained in such a judgment. What is important is that the evidence touching on key issues was satisfactorily re-evaluated by the appellate Court, and urged this Court to find that this was done in the present case.

Ground 4

Counsel submitted that while sentencing the appellant, the learned first appellate Judge considered the period the appellant had spent on remand, and that the manner of taking into account was consistent with the principles articulated in the Supreme Court case of **Abelle vs. Uganda [2018] UGSC 10**, to the effect that where a sentencing court has demonstrated that it has taken into account the remand period, any sentence it has imposed should not be set aside on appeal merely because the sentencing court used different words in their judgment or that they missed to state that they deducted the period spent on remand. These may be issues of style for which the sentencing court should not be faulted when in effect it has complied with the obligation under **Article 23 (8)** of the **1995 Constitution**. Counsel implored this Court to uphold the sentences imposed by the High Court.

Ground 5

It was submitted that there was no merit in the appellant's challenge to the compensation order made by the trial Court for him to pay the respective sums of Australian Dollars 100,400, Kenya Shillings 700,000, and Uganda Shillings 30,000,000/=, and which order was upheld on appeal to the first appellate Court. in counsel's view, the compensation order was just, fair and reasonable. Counsel further submitted that courts, are under **Article 126 (2) (c)** of the **1995 Constitution**, obligated to ensure that adequate compensation is awarded to victims of wrongs, and thus the lower Courts were following the constitutional obligation when they made the orders intended to give compensation to the victims of the appellant's crime. Counsel also submitted that the compensation orders were made in conformity with the **Constitution (Sentencing Guidelines for Courts of Judicature) Practice Directions, 2013**.

Counsel concluded by praying this Court to disallow all 5 grounds of appeal and dismiss the appellant's appeal.

Resolution of the appeal

We have carefully studied the record, and also considered the submissions of counsel for either side and the law and authorities cited. Other applicable law and authorities not cited have also been considered.

This is a second appeal from a decision of the High Court acting in exercise of its appellate jurisdiction. It is now well-established that, ordinarily, the duty of a second appellate Court is to determine whether the first appellate Court properly carried out its duty to re-evaluate the materials presented before the trial Court and thereafter to come up with its own conclusions. In **Muhwezi and Another vs. Uganda, Criminal Appeal No. 21 of 2005 (unreported)**, the Supreme Court stated:

> **"As the second appellate court our duty is to determine whether the first appellate court re-evaluated the evidence on record and properly considered the judgment of the trial judge."**

In **Kifamunte vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1997 (unreported)**, the Court stated:

"It does not seem to us that except in the clearest of cases, we are required to reevaluate the evidence like is a first appellate Court save in Constitutional cases. <u>On second appeal it is sufficient to decide whether the first appellate Court on approaching its task, applied or failed to apply such principles</u>: See P.R. Pandya vs. R. (1957) E.A. (supra) Kairu vs. Uganda (1978) H.C.B. 123."

From the above passage it is clear that a second appellate Court does not ordinarily engage in re-evaluation of evidence except in the "clearest of cases". We observe that no explicit guidance was given in the Kifamunte case, on what constitutes a "clearest of case" that will justify a second appellate Court to re-evaluate evidence. But according to the decided cases, such clear cases include, where there is no evidence to support the findings reached by the lower Courts. **(See: Kifamunte case)**. We shall bear the above principles in mind as we determine this appeal. We shall consider grounds 1, 2 and 3 jointly, and then each of grounds 4 and 5, independently.

Grounds 1, 2 and 3

The appellant, in grounds 1, 2 and 3, challenges the decision of the learned first appellate Judge to uphold the decision of the trial Magistrate to convict the appellant on 1 count of embezzlement, 2 counts of theft and 1 count of stealing a vehicle. The appellant contends that the prosecution evidence was insufficient to support the convictions (ground 1); that the learned first appellate Judge erroneously considered that the appellant was required to raise reasonable doubt in the prosecution case (ground 2); and that the first appellate Court erred when it considered the prosecution evidence in isolation from the defence evidence (ground 3).

Counsel for the appellant made five points in his submissions on ground 1. First, that the appellant was not an employee of FOG and therefore could not be convicted for embezzlement since it was an essential ingredient of the offence. Secondly, that that the appellant did not steal the money, Australian Dollars 104,000 he received on FOG's behalf, but had spent it on organizing crusades and other approved FOG activities. The third point, which related to theft of property covered under count 2, was that the learned trial Judge overlooked defence evidence suggesting that no theft took place at all. Further, that the prosecution evidence contained inconsistencies as to whether the property taken from FOG's premises

belonged to FOG. The fourth point relating to theft of property covered under count 3, was that the first appellate Court did not consider that the appellant took the property from FOG with a claim of right. The fifth point concerning theft of a tractor (count 4) was that the first appellate Court erroneously ignored defence evidence of a sale agreement that showed that the appellant was the owner of the tractor in issue. We shall consider these points, in turn.

On the first point, it is true, as submitted by counsel for the appellant that the offence of embezzlement under **Section 19 (1) (d)** of the **Anti-Corruption Act, 2009**, is committed when an employee steals money belonging to his/her employer. Section 19 (1) (d) provides that:

> **"A person who being a member of an association or a religious organisation or other organisation, steals a chattel, money or valuable security being the property of his or her employer, association, company, corporation, person or religious organisation or other organization ...commits an offence"**

The lower Courts concluded that the prosecution evidence established that the appellant was an employee of FOG at all material times. The first appellate Court stated:

> **"The evidence of PW6, the Human Resource Manager, when read together with exhibit P1, the appointment letter of 21/7/2008 and the termination of contract letter of 1/5/2012, in the absence of evidence to the contrary, renders the 1st appellant's complaint that he was not an employee after 2010 to be false.**
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> **Exhibit P2 clearly proves that the 1st appellant continued earning a salary and was paid his salary for the month of May, 2012 in lieu of a Notice of termination. The earning of a monthly salary beyond the original contract means that the 1st appellant was in employment at the will of the church. He earned a fixed salary for his labour.**
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> **The criticism that he was not an employee yet he earned a fixed monthly salary whilst he continued doing the work at the church is unfounded. The trial Magistrate had no reason to reject the prosecution evidence regarding the status of the 1st appellant. There was no evidence to the contrary.**

The appellant agrees that he was an employee of FOG from 2008 but contends that his employment ended in 2010, before the period between March 2011 to January 2013, during which he allegedly stole money from FOG. According to the evidence, the appellant's employment was terminated

in 2012 and not 2011. Even then, the evidence of PW16 Ray Hannah who made the donation of the money that was stolen was that PW7 and the appellant met with him in a year before 2010, and requested him to donate to their church. The appellant was an employee when the donation requests were made, and it was PW16's evidence that it was due to the appellant's close association with FOG that he transferred money to him. We agree with the learned first appellate Judge's conclusion that the appellant was an employee of FOG for purposes of the money he obtained from PW16.

In the submissions on the second point, counsel for the appellant admits that the appellant obtained money from PW16, but submits that the appellant spent the money on FOG activities like organizing crusades for which it was intended, and therefore he cannot be said to have stolen that money. We find that there was sufficient evidence to support the concurrent findings of the lower Courts that the appellant did not spend money on FOG activities as he claimed. PW7 testified that the appellant ought to have declared the money received from PW16 to the FOG Accounts Department, but never did so. PW7 also testified that money donations to FOG were spent after her authorization and not unilaterally by the appellant. PW7 testified that it was not Oteka's role to handle funds for crusades.

We have also considered the third point made by the appellant that the first appellate Court erred when it found that there was sufficient evidence establishing theft of the property covered under count 2, but we find no merit in the same.

The third point, which related to theft of property covered under count 2, was that the learned trial Judge overlooked defence evidence suggesting that no theft took place at all. Further, that the prosecution evidence contained inconsistencies as to whether the property taken from FOG's premises belonged to FOG. PW1 Mandela Clair testified that she was the store keeper at the FOG premises and kept the keys for the store. She further testified that at about 9:00 p.m on 1st August, 2013, she received a call from Anena Harriet who informed her that certain people were transferring property from a store at the FOG premises. On reaching the store, she found that the padlock on the door was half cut, and the property that was kept in the store was missing. PW1 testified that there was an inventory for the property taken from the store, but the property included speakers for

crusades, amplifiers, parallel lights, flood lights, a mixer, and microphones. PW1 testified that she reported the matter at Gulu Police Station.

PW4 Lubangkene Solomon also testified that on 1st August, 2013, he was at the FOG premises and, had, on the instructions of the appellant broken into a store there and together with a group of other people shifted property from the store to a truck, which took the property away from the premises. PW4 stated that the property taken included an EV speaker, bass beams, monitor speakers, 24 channel mixture, amplifiers, DBS cross over, combo speaker for bass guitar, piano, bass guitar and solo guitar and lights and their wires.

PW1 and PW4 were eye witnesses to the events involving taking of property from the store at FOG. There was no reason to disbelieve their testimony which was not shaken in cross examination. On the other hand, DW3 Olanya Stephen Otim gave unconvincing evidence. The first appellate Court was right in rejecting it. The second point made by counsel for the appellant is rejected. We also do not see any major contradictions in the prosecution case.

The fourth point made by counsel for the appellant in his submissions was that the learned first appellate Court erred when he overlooked evidence of a sale agreement indicating that the appellant had purchased the tractor he was accused of stealing in count 4. The first appellate Court stated, on this point, as follows:

> **"But still on the issue of theft in count four where the appellant is alleged to have stolen a tractor KBN 318J donated to the Church by Mount Olive Maara. It was submitted that the tractor belonged to the 1st appellant. He cleared it through customs and has a sale agreement in his name. The prosecution contends that the tractor belonged to the church and used the 1st appellant for purposes of border clearance. On the face of it, the sale agreement contained in D1 and the URA tax documents exhibited as D1 (b) – (e) speak for themselves. The tractor was purchased by the 1st appellant who paid taxes as its importer.**
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> **But the evidence of PW13 John Kaila Olempurkol from Kenya who was privy to this tractor transaction when read together with exhibits P3 which is a collection of correspondences relating to the tractor from the donors of the said tractor render the purported sale or purchase of the tractor of a crime.**

Exhibit P3 speaks for itself. It gives a history of the donation of the tractor. It is repeated countless times that it was donated to Favour of God Church for its agricultural projects in Gulu. Several letters are written by the donor to say the tractor belongs to the church and not to the 1st appellant. It is surprising that an agreement that was meant to ease the transportation and clearance of a tractor is waved as a document of ownership.

On the basis of the 1st appellant's machinations when dealing with funds sent to the Church by PW16, it is not difficult to identify his scheme to steal the tractor as well from the Church taking advantage of the lengthy tax procedures of importing an old tractor into Uganda from Kenya."

Basing on the above analysis, the learned first appellate Judge upheld the appellant's conviction for theft of the tractor. We have reviewed the record and we find that the conclusions reached by the first appellate Court were reasonable and supportable by the evidence. We therefore uphold them. Grounds 1, 2 and 3 must therefore fail.

Ground 4

Counsel for the appellant submitted, on ground 4, that the sentences that the learned first appellate Judge imposed on the appellant were illegal, because he did not appropriately take into account the period of 19 days the appellant spent on remand as required under **Article 23 (8)** of **1995 Constitution**. Counsel referred to **Rwabugande vs. Uganda, Supreme Court Criminal Appeal No. 24 of 2015** for the proposition that taking into account requires an arithmetic exercise of deducting the remand period from any sentence deemed appropriate.

Counsel for the respondent disagreed, submitting that the learned first appellate Judge imposed legal sentences, in conformity with the guidance laid out in **Abelle vs. Uganda [2018] UGSC 10** that:

"...where a sentencing court has clearly demonstrated that it has taken into account the period spent on remand to the credit of the convict, the sentence would not be interfered with by the appellate court only because the sentencing judge or judges used different words in their judgment or missed to state that they deducted the period spent on remand. These may be issues of style for which a lower Court would not be faulted when in effect the Court has complied with the constitutional obligation in Article 23 (8) of the 1995 Constitution."

There was some controversy as to whether the **Rwabugande** and **Abelle cases** contained irreconcilable guidance on how to appropriately take into account the remand period. It was considered that the Rwabugande guidance was that a sentencing Court must, in taking into account the remand period, carry out an arithmetic exercise involving deduction of the ascertained remand period from any sentence deemed appropriate; whereas the Abelle guidance was that taking into account need not be by conducting an arithmetic exercise provided the sentencing Court demonstrated, in its judgment that it took into account the remand period.

The Supreme Court in **Nashimolo vs. Uganda, Supreme Court Criminal Appeal No. 46 of 2017 (unreported)** delivered on 9th September, 2020 cleared the controversy, by ruling in favour of the Rwabugande guidance and expressly overruling the Abelle principles. The Court also held that all cases handled subsequent to the Rwabugande decision ought to follow the guidance given therein. The sentencing decision in the present case was delivered on 10th May, 2021, hence the first appellate Court was bound by the Rwabugande principles holding that taking into account for purposes of **Article 23 (8)** of the **1995 Constitution** requires an arithmetic exercise of the sentencing Court deducting the ascertained remand period from any sentence it deems fit. The learned first appellate Judge did not conduct this arithmetic exercise, and accordingly, the sentences he imposed were illegal, and we set them aside.

We shall, in exercise of the powers granted under **Section 11** of the **Judicature Act, Cap. 13** proceed to determine appropriate fresh sentences. The said provision states:

> **"11. Court of Appeal to have powers of the court of original jurisdiction.**
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> **For the purpose of hearing and determining an appeal, the Court of Appeal shall have all the powers, authority and jurisdiction vested under any written law in the court from the exercise of the original jurisdiction of which the appeal originally emanated."**

We have upheld the appellant's convictions for embezzlement (count 1), theft (counts 2 and 3) and stealing a vehicle (count 4). During the sentencing hearing, the prosecution submitted the following aggravating factors; that the appellant was not a first offender; that he had stolen money from FOG with premeditation; that the money stolen was not refunded. It was also

submitted that the money stolen by the appellant was meant to be used for offering financial assistance to vulnerable orphans. Further, that the property stolen by the appellant was never recovered. As for the mitigating factors, counsel for the appellant submitted that the charges against the appellant arose out of a family dispute with the complainant (PW7) who was his wife, and that a short sentence was required to facilitate reconciliation.

We have considered that the offences committed by the appellant involved stealing huge sums of money meant for FOG activities, as well as theft of property from FOG. However, the money stolen from FOG was ordered to be refunded, whereas some of the property stolen was also recovered. In those circumstances, our view is that a very lengthy sentence would not be justified. Having considered all circumstances, we find sentences of 3 years imprisonment appropriate on count 1, and sentences of 1 year imprisonment appropriate on each of counts 2, 3 and 4. We shall deduct the period of 19 days the appellant spent on remand, from his date of arrest on 23rd December, 2015 until he was released on bail on 11th January, 2015. The appellant shall serve sentences of 2 years, 11 months and 11 days on count 1, and sentences of 11 months and 11 days on each of counts 2, 3 and 4. The sentences shall run concurrently from the date of conviction of the appellant on 30th November, 2020.

Ground 4 of the appeal succeeds.

Ground 5

The appellant, in ground 5, challenges the learned first appellate Court's decision to uphold orders made by the trial Court for the appellant to pay compensation of various sums of money deemed to have been stolen from FOG by the appellant. The learned trial Magistrate had this to say while making the challenged compensation orders:

> **"For compensation, since there is clear evidence that A1 did not account but received 104,000 Australian Dollars, I shall order that he refunds/compensates FOG the funds they were intended to receive amounting to 104,000 Australian dollars.**
>
> **For the items presented in count 2, some were recovered but there is no clear value of what was not recovered. I shall order for minimal compensation of 30,000,000/=**

And for count 3, it is not all (sic) clear of what belonged to FOG and matrimonial property. I shall not order for any compensation.

Lastly, for the tractor, I agree with the defence, it has depreciated but one would also say that it would have generated income. For all the period of five years, no income was generated from it. Accordingly, I take the value of 700,000 KSH, the value presented as per DE1 by A1. All the above compensation shall be met by A1."

Counsel for the respondent correctly submitted that **Article 126 (2) (c)** of the **1995 Constitution** enjoins Courts to award adequate compensation to victims of wrongs. However, in our view, the Courts must act on evidence to determine the precise amount of compensation to be ordered. The Courts should avoid speculating on the amount of compensation where there is insufficient evidence.

In the present case, we agree that there was evidence supporting the decision to order the appellant to pay compensation of Australian Dollars 104,000 being the money advanced to him for FOG activities, but which he did not spend as required.

However, regarding the award of Ug. Shs. 30,000,000/= being the value of the musical instruments the appellant took from FOG's store as well as the award of Kenyan Shillings 700,000/= being the value of the tractor stolen by the appellant, we agree with the submissions of counsel for the appellant that the value of that property was not proved by sufficient evidence. We are of the view that the prosecution ought to have adduced evidence of valuation to show the worth of the property in issue but this was not done. The learned trial Magistrate engaged in speculation in arriving at the value of compensation he awarded. He erred to do so. Ground 4 of the appeal succeeds.

In view of the above reasons, the appeal partially succeeds and we make the following declarations and orders:

a) The appellant's respective convictions for one count of **Embezzlement** contrary to **Section 19 (d) (i) of the Anti-Corruption Act, 2009** (count 1); two counts of **Theft** contrary to **Sections 254 (1)** and **261** of the **Penal Code Act, Cap. 120** (counts 2 and 3); and one count of

Stealing a Vehicle contrary to **Section 265** of the **Penal Code, Cap. 120 (count 4)**, are upheld.

b) The appellant shall serve sentences of 2 years, 11 months and 11 days on count 1, and sentences of 11 months and 11 days on each of counts 2, 3 and 4. The sentences shall run concurrently from the date of conviction of the appellant on 30th November, 2020.

c) The order for the appellant to pay compensation of Australia Dollars 104,000 arising from the conviction on count 1 is upheld.

d) The orders for the appellant to pay compensation of Ug. Shs. 30,000,000/= and Kenya Shillings 700,000 arising from the convictions on counts 2 and 4, respectively, are set aside.

This a judgment by the majority of the members of the Court (Musoke and Musota, JJA). Bamugemereire, JA did not agree and has not signed the judgment of the Court.

We so order.

Dated at Kampala this ..... day of ..... 2023.

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Elizabeth Musoke

Justice of Appeal

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Catherine Bamugemereire

Justice of Appeal

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Stephen Musota

Justice of Appeal